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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 398

LAKESIDE TRUCK RENTAL, INC.,
Petitioner,

v.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

BERNARD S. GOLDFARB,
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55 Public Square,
Cleveland, Ohio,
Counsel for Petitioner.

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STANLEY J. BOWERS,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on May 8, 1963.

CITATIONS TO OPINIONS BELOW.

The opinions referred to in this petition are printed in Appendix B hereto at page 15. The opinion and the Order of the Tax Commissioner of Ohio is printed as page 15. The Entry of the Board of Tax Appeals of June 2, 1961 is printed as page 18. The Opinion of the Supreme Court of Ohio, 173 O. S. 108 (Feb. 14, 1962), is printed at page 22. The Entry of the Board of Tax Appeals of March 20, 1962 is printed at page 26. The Opinion of the Supreme Court of Ohio, 174 O. S. (April 17, 1963), is printed at page 31. The Assignments of Error to the Supreme Court of Ohio from the Entry of the Board of Tax Appeals of March 20, 1962 is printed at page 34. Order Denying Rehearing is printed at page 36.

JURISDICTION.

The Supreme Court of the State of Ohio decided this cause in a second decision on April 17, 1963 and a rehearing was denied on May 8, 1963. The jurisdiction of this court is invoked by virtue of the fact that pertinent provisions of the Constitution of the State of Ohio and of the United States of America, primarily the "due course of law" and "due process of law" provisions respectively of the Constitutions, by virtue of the fact that your petitioners were deprived of their rights to a hearing before a state administrative body by the said body summarily entering its opinion without hearing and the issue could only be raised for the first time in the Assignments of Error to the Supreme Court of Ohio, which Assignments of Error, among other things, set forth that the Board of Tax Appeals of Ohio was arbitrary, oppressive and unreasonable; failed to follow the law of the case; failed to give notice of time and place of hearing; based its decision without the support of any evidence and failed to comply with the Opinion of the Supreme Court of Ohio in allowing your petitioners to be heard on the basis of law as established by the Supreme Court of Ohio, which was nonexistent at a prior hearing before the Board of Tax Appeals in this cause although it was urged by your petitioners and disavowed by the Board of Tax Appeals, thus presenting an important administrative law question.

QUESTION PRESENTED.

When the Supreme Court of Ohio has decided a case based on facts in the record and reverses the Board of Tax Appeals, an administrative body, can the Board, on the very same record, without notice or hearing, rewrite its entry ignoring the uncontradicted facts supporting the Supreme Court decision and confirm the conclusion it reached prior to the appeal reversing it and arbitrarily refuse or fail to hear further evidence when it feels that such further evidence is necessary on the remand.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America are printed in Appendix A. Revised Code of Ohio, sections 5739.01 (E) (2) and 5739.02. See Appendix A.

STATEMENT.

This matter originally came before the Tax Commissioner of Ohio to consider an assessment of sales tax for the leasing of certain trucks to retail furniture outlets engaged in business at Cleveland, Ohio.

The petitioner took the position at that time that inasmuch as the trucks were used to deliver bulky retail furniture, they were exempt from the Sales Tax Law of Ohio by virtue of their use in the consummation of a retail sale. This position was rejected by the Tax Commissioner (See Appendix B, p. 16) and an appeal was taken to the Board of Tax Appeals which also rejected the position. (See Appendix B, p. 18).

In the hearing before the Board of Tax Appeals, F. J. O'Neill, Jr., President of your petitioner, testified as follows:

"* * * Q. Now, Mr. O'Neill, referring to the type of business that you do, would you explain your operations to this Board with respect to Kurtz Furniture Company and Bing Company?

A. Both of the companies mentioned are in the retail furniture business, with a number of stores throughout the City and throughout the State in the case of Bing's. They sell in most cases, I would imagine, large bulky-type items of furniture and our furnishing them the vehicle—we furnish them with all the component parts except the labor and they use this vehicle to consummate the sale that they have made in their stores." (p. 7, Record.)

* * * * *

"Q. These trucks that you furnish then to the Bing Company and Kurtz, they are used then to complete the sale made by these companies?

A. Yes, sir.

Mr. Kirwin: By that you mean that they are used to haul the merchandise from the Bing Company store to where the consumer wants it delivered?

The Witness: That is correct, sir." (p. 22, Record.)

On appeal to the Supreme Court of Ohio (See Appendix B, page 22) the Court reversed the Board of Tax Appeals.

"TAFT, J. This case involves the question whether trucks used by a vendor in making deliveries of items sold to his retail customers are used 'directly in making retail sales' within the meaning of those words as found in the portion of Section 5739.01 (E) defining 'retail sale,'" (See Appendix A, p. 14.)

"The question in the instant case is not, as the Board of Tax Appeals indicated in its decision, whether the appellant was 'in the business of making "retail sales" of furniture and appliances' or whether 'if used the trucks directly in making retail sales.' Because they involved a transfer of possession of the trucks for a consideration, the rentals of those trucks by the appellant to the furniture dealers amounted to sales under the definition of 'sale' set forth in Section 5739.01 (B). However, no tax is levied except on a 'retail sale.' Section 5739.02, Revised Code. Under the words of Section 5739.01 (E) (2) (see Appendix A p. 14), the rental of one of those trucks would not amount to a 'retail sale' if 'the purpose of the consumer' was 'to use * * * the thing transferred (i.e., the truck), * * * directly in making retail sales.'

"Here the 'consumer' is a furniture company which is, to use the words of Section 5739.01 (D), 'the person to whom the transfer effected * * * by a sale is or is to be made or given.' The appellant in the instant case is not the consumer. Hence, if, with respect to rental of a truck to one of these furniture companies, the purpose of the furniture company (the consumer) was 'to use * * * the thing transferred (i.e., the truck) * * * directly in making retail sales,' there would be no tax on the rental paid by the consumer furniture dealer to the appellant for that truck."

* * * * *

"In such an instance, delivery is an essential part of the making of such retail sale, which does not end until such delivery is made; and a truck used directly in making that delivery is used directly in making that

retail sale. See also Sections 5739.03 and 5739.09, Revised Code.

"The Board of Tax Appeals did not consider the question whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rental truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made.

"The cause must therefore be remanded to the board for consideration of such questions.

"The board gave as a further reason for holding against the appellant that no exemption certificates were shown to have been received by the appellant. That there is no basis for such a reason is indicated by the provisions of Section 5739.03, Revised Code, as in effect at the times involved in the instant case. 126 Ohio Laws, 724; 128 Ohio Laws, 429.

"It is not necessary at this time for us to consider the other questions of law raised by appellant.

Decision reversed.

ZIMMERMAN, MATTHIAS, BELL and O'NEILL, JJ., Concur.

WEYGANDT, C. J., dissents.

HERBERT, J., not participating."

The Entry of the Supreme Court of the State of Ohio in this cause states that *"On consideration thereof, the decision of the Board of Tax Appeals is reversed for the reasons stated in the opinion herein."* (Emphasis supplied.) Notwithstanding the decision of the Supreme Court of Ohio, the Board of Tax Appeals under date of March 20, 1962 summarily and *without any notice* caused an Entry to be made dated March 20, 1962 (Appendix B, p. 26) wherein the Board of Tax Appeals states that the matter "came on further to be considered" after the Su-

preme Court decision and states that "The matter is therefore resubmitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented at a hearing in Cleveland, Ohio, on *March 3, 1961*, the briefs filed by counsel and the remand by the Supreme Court."

The Board of Tax Appeals then goes on to state that the statements made are "opinion and mere statement of the witness"; that "there is in the Record no testimony or evidence to indicate that the witness was in any position to know exactly how the trucks were being used * * *"; that "It is obvious that the trucks * * * can be used" in different ways; and that the tax status depends "upon proof."

The Board then goes into a lengthy discussion of how the trucks can be used, *none of which is based on any evidence in the record*, and recites four specific instances as follows:

> "Trucks, such as here involved, can be used by a retail furniture dealer to haul items (1) from one retail store to another, or (2) from a warehouse to a store, or (3) from a store to a warehouse, or (4) from a railhead or dock to a store or warehouse, etc. None of these uses would except the truck rental charge from sales taxation."

and then the Board engages itself in the fanciful academic reverie how the appellant *should have* established its case:

> "In the instant case it is apparent that appellant, *if it wished* to overcome the presumption of taxability set out in R. C. Section 5739.02, see Appendix A, p. 14, *should have* established by competent and credible evidence that:

"(1) the rented trucks were actually used either exclusively or primarily by Kurtz or Bing to deliver merchandise to the homes of customers who had purchased the merchandise at Bing or Kurtz retail outlets, and that

"(2) the contracts for the sale of said furniture merchandise required Bing and Kurtz and credible deliveries to the places indicated by the customers. (On this point there was no testimony or evidence whatsoever.)

"A suitable witness *would have been* an officer or an employee of Bing and Kurtz who had firsthand knowledge of the exact use made by them of the trucks and the exact terms of the contracts which they had entered into with their retail customers. (Emphasis supplied.)

"In conclusion, it is the finding of this Board that the testimony and evidence in the record is insufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented trucks for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made." (See Appendix B, pp. 30-31.)

REASONS FOR GRANTING THE WRIT.

1. The basic question presented is one of importance in administrative law and this Court has considered the granting of a Writ because of such important issues (*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 60 S. Ct. 437 (1940)). While your petitioners urged that they were exempt from the Sales Tax Law of Ohio, the Tax Commissioner and the Board of Tax Appeals rejected this issue. The Supreme Court of Ohio disagreed and established the principle that trucks used in the delivery of furniture equipment from a retail outlet to a consumer were tax exempt. Apparently the Record contained sufficient evidence for the Supreme Court of Ohio to come to its conclusion and on a remand, even if the Board of Tax Appeals felt that there was inadequate evidence in the Record, it was duty bound to grant a rehearing by virtue of the changed condition of the law. This Court has held that a change in economic conditions justified a rehearing. *Atchison, Topeka & Santa Fe Railway Co., et al. v. United States, et al.*, 284 U. S. 248, 60 S. Ct. 146 (1932). A change in law in the same matter should justify the same conclusion, to wit, a rehearing. The leading case on the subject of rehearing sets forth the principle urged here for review. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 301 (1939), p. 374, per Chief Justice Hughes:

> "(13) Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. Federal Trade Commission v. Curtis Publishing Co., supra; International Shoe Co. v. Federal Trade Commission, supra. If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be

taken. Federal Trade Commission v. Royal Milling Co., supra; Procter & Gamble Company v. Federal Trade Commission, supra; Ohio Leather Company v. Federal Trade Commission, supra; Agwilines, Inc. v. National Labor Relations Board, supra. Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements.

"(14) Fourth. The present controversy thus comes to the narrow point that instead of setting aside the Board's findings and order, the court has allowed the Board itself (375) to set them aside. The contention on that ground is without substance. In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and order and petitioner will thus be completely freed from any determination they contain or any obligation they impose.

* * * * *

"(17) There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid. * * *"

A judicial declaration intervening between two proceedings may so change the "legal atmosphere" that it cannot be ignored, and a collateral estoppel will not be applied to a second hearing. *Commissioner of Internal Revenue v. Sunnen*, 333 U. S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

It would then logically follow that if the estoppel will not be applied, a second hearing is not only warranted but

absolutely essential to a fair adjudication. Relitigation of the same issues is again not precluded under the rules of res judicata and collateral estoppel where a later Supreme Court decision has changed applicable law. *Schultz Transit, Inc., et al. v. United States of America and Interstate Com. Com.*, 208 F. Supp. 537 (1962).

2. The Supreme Court of Ohio in its second Opinion (See Appendix B, page 33) refers to a presumption as contained in R. C. 5739.02 discussed by the Board of Tax Appeals and states that the burden rests on the taxpayer to claim the exception. The taxpayer in its testimony stated the manner in which the equipment was to be used, namely, for the delivery of retail furniture from retail outlets to the consumer. This evidence was uncontradicted. There was no cross-examination (See Record, pages 7, 22) and under these circumstances the presumption cannot prevail. When "some evidence" is produced to the contrary, "the inference is at an end." In addition thereto, this Court in *Western & A. R. R. v. Henderson, et al.*, 279 U. S. 639, 49 S. Ct. 445 (1929), p. 642, per Mr. Justice Butler stated:

> "(1-3) Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repeal it, violates that due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property. *Manley v. Georgia*, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. ; and cases cited."

Admissibility of evidence is not affected by a witness qualifying his testimony with "I think", "I believe," as this is common and its use encourages fairness on the part of honest witnesses. 21 O. J. 2nd, Sec. 408, p. 414.

3. It has been recognized that administrative bodies should not be constrained too narrowly by technical rules. It has been established that "parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." When an Appellate Court lays bare the error of an administrative body, it is the duty of that administrative body to judge fairly and reasonably with full opportunity for fair hearings. *Federal Communications Commission v. Pottsville Broadcasting Co.* (*supra*).

4. It has been submitted that the Fourteenth Amendment of the United States Constitution has been violated in that the failure to rehear was "without due process of law" and Article XVI of the Constitution of the State of Ohio which provides that every person "shall have remedy by due course of law" and it is further directed to the Court's attention that both Articles are equivalent of one to the other in meaning. *Direct Plumbing Supply Co., et al. v. City of Dayton, et al.*, 138 O. S. 540 (1941).

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERNARD S. GOLDFARB,
Counsel for Petitioner

Cleveland, Ohio
Aug. 16, 1963

APPENDIX A.

CONSTITUTIONS AND STATUTES.

CONSTITUTION OF THE STATE OF OHIO.

ARTICLE I

"16. Redress in Courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (Adopted Sept. 3, 1912.)"

CONSTITUTION OF THE UNITED STATES.

AMENDMENT XIV.

Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

R. C. 5739.02 (5546-2). Levy of tax, purpose; rate; exemptions.

"For the purpose of the proper administration of Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established."

"R. C. 5739.01. Definitions.

As used in Sections 5739.01 to 5739.31, inclusive, of the Revised Code:

* * * * *

"(E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is:

* * * * *

"(2) To incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, or mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture and persons engaged in rendering farming, agricultural, horticultural or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas; or directly in making retail sales or directly in the rendition of a public-utility service, except that the sales tax levied by Section 5739.02 of the Revised Code shall be collected upon all meals, drinks, and food for human consumption sold upon Pullman and railroad coaches."

APPENDIX B.

ORDER OF THE TAX COMMISSION

In the matter of Sales Tax
Assessment, Serial No. J 7835
Lakeside Truck Rental, Inc.,
3929 Superior Avenue,
Cleveland 14, Ohio
Vendor's License No. 90-77087
91-24871

The Tax Commissioner came to consider the above styled matter at a hearing scheduled thereon at Cleveland, Ohio, on October 11, 1960. The following appearances were entered on behalf of the assessee: F. J. O'Neill, Jr., President; George Wagner, Vice President; Bernard S. Goldfarb, Attorney at Law, 1625 The Illuminating Bldg., 55 Public Square, Cleveland 13, Ohio.

Now, being fully advised thereon, the Commissioner finds:

The assessee is engaged as a business, among other operations, in the rental of motor vehicles to be used in the transportation of property.

The assessee objects to the amount of the tax deficiency and further complains:

1. That the equipment so rented is used by the lessees directly in the making of sales at retail.

2. That tax has been levied on toll charges.

3. That transactions have been duplicated in the audit detail.

4. That tax had been erroneously levied on a transaction wherein the consumer had furnished the assessee with a certificate of exemption within season.

5. That tax had been erroneously levied on transactions made in interstate commerce.

6. That assessee's total charges for the rental of equipment included its costs for gasoline, oil, parts, tires, insurance premiums, license plate fees and said costs should have been deleted in the determination of the tax base.

The assessee to sustain its first objection submits that the equipment involved was rented to The Bing Company and The Kurtz Company, retail furniture dealers, both companies being located in Cleveland, Ohio. It is the assessee's position that by reason of the type of merchandise sold by its lessees that delivery to consumer can be effected only by means of the rented vehicles, hence the rental of the equipment is entitled to be accorded an exempt status. Delivery equipment is not exempted from the imposition of sales tax regardless of the type of merchandise requiring this service. The exception of the assessee is denied.

The assessee's exceptions Nos. 2, 3, 4 and 5 on the evidence submitted are found well taken and will be allowed as hereinafter set forth in the summary of adjustment.

The assessee's sixth objection is denied. The tax is applicable to the entire charge without deduction, in other words, all obligations of the assessee which are reflected in the rental charge are a part of the tax base. Insofar as rule 134 might be claimed to apply to the period in the audit prior to its cancellation on January 13, 1959, no evidence was submitted to show that the portion of the rentals alleged to relate to personal liability and property damage insurance or license plate fees were separately stated in the invoice to the lessee.

SUMMARY OF ADJUSTMENT

Objection No.		*Amount of Tax*
2	Toll charges	$53.50
3	Duplication	10.80
4	Exemption Furnished	2.29
5	Interstate Commerce	8.85
	Total Tax Canceled	$75.44

The penalty should be conditionally remitted, in part as noted.

Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	*Penalty*	*Total*
(Sales)	$4766.04	$238.30	$5004.34

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amount:

	Assessment	*Penalty*	*Total*
(Sales)	$4766.04	$714.90	$5480.94

DEPARTMENT OF TAXATION,
/s/ STANLEY J. BOWERS,
Tax Commissioner

ENTRY.

(Filed June 2, 1961.)

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of December 2, 1960, by the appellant above named from a final order of the Tax Commissioner dated November 10, 1960, in and by which final order that official confirmed a sales tax assessment theretofore made against appellant in the basic amount of $4,766.04, with a penalty thereon in an amount to be contingent upon the date of payment of the basic assessment, all as set out by the terms of the final order.

The audit period involved herein is January 1, 1956, to December 31, 1959.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented to the Board of Tax Appeals at a hearing in Cleveland, Ohio, on March 3, 1961, and the briefs filed by counsel.

The appellant, during the audit period, was engaged in the business of renting and leasing automotive trucks, tractors and trailers. Two of its principal customers were The Kurtz Furniture Company and The Bing Company, both of which corporations were said to be engaged in the business of making retail sales of furniture and appliances. The automotive equipment thus leased was said to have been used by these two corporations to transport furniture and appliances from the lessee's retail stores to the homes of their customers. The rented equipment was operated by employees of Kurtz or Bing, and appellant furnished no drivers for the equipment thus leased.

From the testimony and evidence presented to the Board of Tax Appeals it appears that there was no formal

contract between appellant and its lessees to govern the lease of the equipment, and the only document presented in evidence relative to the transactions involved is appellant's Exhibit Number 1, which exhibit is an invoice or statement rendered by appellant to The Bing Company on April 23, 1956, to cover truck rental for the week ending April 20, 1956, and said invoice is said to be typical of all invoices involved in the assessment which is before us.

From this document, when read in conjunction with the testimony, it appears that trucks and trailers were rented by appellant to The Bing Company and to The Kurtz Furniture Company for a fixed weekly sum ($32 to $35 per week), plus an additional charge for mileage traveled (.09¢ to 13¢ per mile) and that the lessee was billed at the end of each week by an invoice similar to the invoice which has been designated appellant's Exhibit Number 1.

The charges listed on appellant's Exhibit Number 1 for truck rental total $772.11, and the sales tax quoted as being charged thereon is $7.72, which latter amount is one per cent of the total truck rental charge. On the invoices rendered to The Kurtz Furniture Company the sales tax was computed and charged by appellant at a 2% rate of the total rental charge. The Tax Commissioner, in computing appellant's sales tax liability for the rental of its equipment, used 3% of the total charge made by the appellant on its invoices.

The appellant says that the 1% and 2% figure which it used to compute sales tax was an estimated figure, based on experience, to properly reflect the sales tax due on a rental of the equipment, excluding from the total charge the amount that appellant spent for gasoline, insurance, licenses, etc., for the equipment.

The Tax Commissioner says that the rental "price" noted on each invoice is the total rental charge and that

there can be no deduction from this total rental charge in computing the Ohio 3% sales tax thereon as levied by the provisions of R. C. 5739.02.

There is no evidence that appellant was in the business of making "retail sales" of furniture and appliances, and it is therefore obvious that its claim that it used the trucks directly in making retail sales is without merit. The appellant was in the business of making "retail sales" of automotive equipment. This assessment is made against appellant as a vendor or lessor of trucks, tractors and trailers, and it was bound to collect the 3% charge on the rental thereof in all cases where it was not furnished exemption certificates by its customers. No such exemption certificates were shown to have been received by it.

The only valid issue for determination by the Board of Tax Appeals may therefore be stated as follows:

"For what 'consideration' or 'price' did appellant lease its automotive equipment?"

The pertinent provisions of R. C. 5739.01 are as follows:

"As used in sections 5739.01 to 5739.31, inclusive, of The Revised Code:

"(A) * * *

"(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever; * * *.

"(C) 'Vendor' means the person by whom the transfer is effected or license given by a sale is or is to be made or given; * * *.

"(D) * * *

"(E) * * *

"(F) * * *

"(G) * * *

"(H) 'Price' means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a vendor in the complete performance of a retail sale, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or allowed after the sale is consummated, or any other expense. * * *"

From the testimony and evidence before us it is obvious that the "price" charged by appellant for the rental of its automotive equipment is the total of (1) the weekly charge and (2) the mileage charge, without any deduction for expenses incurred and paid by appellant in furnishing and maintaining the equipment. See *Motor Lease, Inc., v. Bowers*, B. T. A. Case No. 36597, decided July 31, 1958, and *M. E. Milligan, Inc. v. Bowers*, B. T. A. Case No. 37370, decided October 22, 1958.

In the *Milligan* case, above noted, the total rental charge set out on the invoice was reduced by certain credits representing purchases of gasoline or oil *paid for by the lessee*, as provided in the written lease agreement, prior to the computation of the tax. The credits in that case were for payments made by lessee to someone other than the lessor, and in that case all payments made by lessee to lessor were held to be taxable as being the consideration passing from the lessee to the lessor. In the intant case there is no testimony or evidence that the lessees purchased or paid for any fuel for the trucks, and, in any event, there is no credit memo for such transactions noted on the invoices.

It is the conclusion of the Board of Tax Appeals that the final order of the Tax Commissioner is in all respects proper, legal and reasonable, and said final order is accordingly affirmed.

OPINION OF THE SUPREME COURT OF OHIO.

(No. 37123—Decided February 14, 1962.)

These proceedings originated with a tax deficiency assessment against appellant on account of nonpayment of sales tax on rental charges paid principally by two furniture dealers to the appellant for trucks rented by the appellant to those furniture dealers and used by those furniture dealers in delivering items sold by those dealers to their retail customers.

So far as pertinent, Section 5739.01, Revised Code, reads:

"(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred * * * for a consideration * * * whether for a price or rental * * *.

"(E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is:

"* * *

"(2) * * * to use or consume the thing transferred * * * directly in making retail sales * * *."

In objecting to the deficiency assessment, the appellant contended "that the equipment so rented is used by the lessees directly in the making of sales at retail."

In upholding the deficiency assessment, the order of the Tax Commissioner states that "delivery equipment is not excepted from the imposition of sales tax regardless of the type of merchandise requiring this service."

On appeal to the Board of Tax Appeals, that order of the Tax Commissioner was affirmed.

The cause is now before this court on appeal from the decision of the Board of Tax Appeals.

Mr. Bernard S. Goldfarb, for appellant.

Mr. Mark McElroy, attorney general, and *Mr. John J. Lokos*, for appellee.

TAFT, J. This case involves the question whether trucks used by a vendor in making deliveries of items sold to his retail customers are used "directly in making retail sales" within the meaning of those words as found in the portion of Section 5739.01 (E) defining "retail sale."

There are no decisions of this court that have considered whether items used in making deliveries to retail customers are used directly in making retail sales. There is nothing in the report of *United States Steel Corp. v. Bowers, Tax Commr.* (1960), 170 Ohio St., 558, 167 N. E. (2d), 87, to indicate that it was contended in that case that the lumber there involved was so used. Even in quoting from Section 5739.01 (E) (2), the report of that case omits the portion of that statute with respect to use "directly in making retail sales."

The question in the instant case is not, as the Board of Tax Appeals indicated in its decision, whether the appellant was "in the business of making 'retail sales' of furniture and appliances" or whether "it used the trucks directly in making retail sales." Because they involved a transfer of possession of the trucks for a consideration, the rentals of those trucks by the appellant to the furniture dealers amounted to sales under the definition of "sale" set forth in Section 5739.01 (B). However, no tax is

levied except on a "retail sale." Section 5739.02, Revised Code. Under the words of Section 5739.01 (E) (2), the rental of one of those trucks would not amount to a "retail sale" if "the purpose of the consumer" was "to use * * * the thing transferred [*i. e.*, the truck] * * * directly in making retail sales."

Here the "consumer" is a furniture company which is, to use the words of Section 5739.01 (D), "the person to whom the transfer effected * * * by a sale is or is to be made or given." The appellant in the instant case is not the consumer. Hence, if, with respect to rental of a truck to one of these furniture companies, the purpose of the furniture company (the consumer) was "to use * * * the thing transferred [*i. e.*, the truck] * * * directly in making retail sales," there would be no tax on the rental paid by the consumer furniture dealer to the appellant for that truck.

The words of Section 5739.01 (B), Revised Code, a part of the Sales Tax Act, defining "sale" clearly indicate that there is no sale within the meaning of the Sales Tax Act until there is a transfer of either possession or title. Unless a different intention appears from a contract of sale, if such contract requires the vendor to deliver items sold at retail, title to such items will not pass until delivery. Section 1315.20, Revised Code. See *Hallet & Davis Piano Co. v. Starr Piano Co.* (1911), 85 Ohio St., 196, 97 N. E., 377; *Rehr, Recr., v. Trumbull Lumber Co.* (1924), 110 Ohio St., 208, 143 N. E., 558; *Baltimore & Ohio Southwestern Ry. Co. v. Good* (1910), 82 Ohio St., 278, 92 N. E., 435, 29 L. R. A. (N. S.), 713. See also Section 1302.42 (B), Revised Code, a part of the Uniform Commercial Code, to be effective July 1, 1962.

In such an instance, delivery is an essential part of the making of such retail sale, which does not end until such

delivery is made; and a truck used directly in making that delivery is used directly in making that retail sale. See also Sections 5739.03 and 5739.09, Revised Code.

The Board of Tax Appeals did not consider the question whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made.

The cause must therefore be remanded to the board for consideration of such questions.

The board gave as a further reason for holding against the appellant that no exemption certificates were shown to have been received by the appellant. That there is no basis for such a reason is indicated by the provisions of Section 5739.03, Revised Code, as in effect at the times involved in the instant case. 126 Ohio Laws, 724; 128 Ohio Laws, 429.

It is not necessary at this time for us to consider the other questions of law raised by appellant.

Decision reversed.

ZIMMERMAN, MATTHIAS, BELL and O'NEIL, JJ., concur.

WEYGANDT, C. J., dissents.

HERBERT, J., not participating.

ENTRY OF THE BOARD OF TAX APPEALS FOLLOWING REVERSAL BY THE SUPREME COURT OF OHIO.

(Entered March 20, 1962.)

This cause and matter came on further to be considered by the Board of Tax Appeals following the receipt by the Board of Tax Appeals of a certified copy of a journal entry adopted by the Supreme Court of Ohio on February 14, 1962, in the case of Lakeside Truck Rental, Inc., Appellant, v. Stanley J. Bowers, Tax Commissioner, Appellee, being Case No. 37123 on the docket of that court.

In and by the above-quoted journal entry the decision of the Board of Tax Appeals in the same case, dated June 2, 1961, was reversed for the reasons stated in the opinion of the court, which opinion is reported in Volume 173 of the Ohio State Reports at Page 108.

In Judge Taft's opinion therein, at page 110, is found this language:

> "The Board of Tax Appeals did not consider the question whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made.
>
> "The cause must therefore be remanded to the Board for consideration of such questions."

The matter is therefore resubmitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented at a hearing in Cleveland, Ohio, on March 3, 1961, the briefs filed by counsel and the remand by the Supreme Court.

The appellant herein, during the audit period, was in the business of leasing automotive equipment (trucks, tractors and trailers) to its customers for a consideration. Two of its lessees were The Bing Company and The Kurtz Furniture Company. These last two mentioned corporations employed their own drivers to operate the equipment thus leased. The rental charge, in each instance, was on a fixed weekly amount ($32 to $35 per week), plus an additional charge for mileage traveled (09c to 13c per mile), and the lessee was billed at the end of each week by an invoice similar to the invoice designated Appellant's Exhibit No. 1.

The charges listed on Appellant's Exhibit No. 1 for truck rental total $772.11, and the sales tax quoted as being charged thereon is $7.72, which latter amount is 1% of the total truck rental charge. On the invoices rendered to The Kurtz Furniture Company the sales tax was computed and charged by appellant at a 2% rate of the total rental charge. The Tax Commissioner, in computing appellant's sales tax liability for the rental of its equipment, used 3% of the total charge made by the appellant on its invoices. In its June 2, 1961, decision the Board of Tax Appeals stated the issue it was deciding as follows:

> *For what "consideration" or "price" did appellant lease its automotive equipment?*

In its decision the Board of Tax Appeals affirmed the action of the Tax Commissioner in computing appellant's tax liability on the basis of 3% of the total "consideration," which "consideration" the Board found to be the total "price" charged without the deductions therefrom claimed by the appellant. (R. C. Section 5739.01 H.)

The Board likewise found that no exemption certificates (R. C. Section 5739.03) were shown to have been

received by appellant from the lessees in these transactions, which is one of the ways a vendor can avoid his obligation to collect sales tax when proper circumstances permit the transfer of tangible personal property for a consideration. The Board made no separate finding as to whether the appellant had established, by other evidence, that it need not collect the tax pursuant to the pertinent provisions of R. C. Section 5739.03. Or, as stated by the Supreme Court, the Board did not consider "whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented truck for deliveries of items sold to rental customers under contracts of sale not to be completed until such deliveries had been made."

With respect to this particular issue, the Board notes that the one specification of error set out in appellant's notice of appeal filed with this Board that could possibly apply is appellant's Specification of Error No. 2 wherein it is claimed that the final order of the Tax Commissioner is erroneous:

> "By virtue of the nature of the business operations of the appellant, it should be exempt from the tax for the reason that its activities are engaged to consummate a retail sale."

It appears to this Board that it is somewhat doubtful if this language is definite enough to be considered as a claim that the final order of the Tax Commissioner is erroneous in that he has levied a sales tax against automotive equipment rental charges when the lessees of said equipment used and consumed the equipment directly in making retail sales thereby excepting said rental charges from taxation. See *American Culvert v. Glander*, 158 Ohio State Reports, at Page 351; *Queen City Valves v.*

Peck, 161 Ohio State Reports, at Page 579, and *Ladis v. Peck*, 162 Ohio State Reports, at Page 159.

However, for the purpose of deciding the question before us, we will consider the language used by appellant to be specific on the point involved.

The only testimony presented to the Board of Tax Appeals on the point involved was given by F. J. O'Neill, Jr., President of Lakeside Truck Rental, Inc., the appellant herein.

At page 7 of the Record of testimony presented to the Board of Tax Appeals is found the following:

> "Q. (By Mr. Reznick): Now, Mr. O'Neill, referring to the type of business that you do, would you explain your operations to this Board with respect to Kurtz Furniture Company and Bing Company?
>
> "A. Both of the companies mentioned are in the retail furniture business, with a number of stores throughout the City and throughout the State in the case of Bing's. They sell in most cases, I would imagine, large, bulky-type items of furniture and our furnishing them the vehicle—we furnish them with all the component parts except the labor and they use this vehicle to consummate the sale that they have made in their stores."

and, again, at page 22 of the Record:

> "Q. (By Mr. Reznick): These trucks that you furnish then to the Bing Company and Kurtz, they are used then to complete the sale made by these companies?
>
> "A. Yes, sir.
>
> Mr. Kirwin (B. T. A. Attorney-Examiner): By that you mean that they are used to haul the merchandise from the Bing Company store to where the consumer wants it delivered?
>
> The Witness: That is correct, sir."

Upon a consideration of this matter, it is the view of the Board of Tax Appeals that the statement made by appellant's president, as to the use of the rented equipment by its customers, must be considered only as the OPINION and mere STATEMENT of the witness as to such use. The evidence in the record shows that appellant furnished no driver or other employee with the rented equipment, and there is in the record no testimony or evidence to indicate that the witness was in any position to know exactly how the trucks were being used by either The Bing Company or The Kurtz Furniture Company, other than what possibly had been told to him.

It is obvious that the trucks, such as are involved herein, can be used by retail furniture stores in many different ways, and that the tax status of the rental thereof depends upon *proof*, and not mere statement, that the trucks are actually used in such a way that the rental thereof is excepted from sales taxation.

Trucks, such as here involved, can be used by a retail furniture dealer to haul items (1) from one retail store to another, or (2) from a warehouse to a store, or (3) from a store to a warehouse, or (4) from a railhead or dock to a store or warehouse, etc. None of these uses would except the truck rental charge from sales taxation.

In the instant case it is apparent that appellant, if it wished to overcome the presumption of taxability set out in R. C. Section 5739.02, should have established by competent and credible evidence that:

(1) the rented trucks were actually used either exclusively or primarily by Kurtz or Bing to deliver merchandise to the homes of customers who had purchased the merchandise at Bing or Kurtz retail outlets, and that:

(2) the contracts for the sale of said furniture merchandise required Bing and Kurtz to make the deliveries to the places indicated by the customers. (On this point there was no testimony or evidence whatsoever.)

A suitable witness would have been an officer or an employee of Bing and Kurtz who had firsthand knowledge of the exact use made by them of the trucks and the exact terms of the contracts which they had entered into with their retail customers.

In conclusion, it is the finding of this Board that the testimony and evidence in the record is insufficient to support a finding that as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented trucks for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made.

The final order of the Tax Commissioner must be, and therefore is, affirmed.

OPINION OF THE SUPREME COURT OF OHIO, NO. 37,521.

(Decided April 17, 1963.)

This case arose from a sales tax deficiency assessment against the appellant on account of nonpayment of sales tax on rental charges paid principally by two furniture dealers to the appellant for trucks rented by the appellant to those furniture dealers and used by them in delivering merchandise sold by them to their retail customers. In approving the deficiency assessment, the Tax Commissioner stated in his order that "delivery equipment is not excepted from the imposition of sales tax regardless of the type of merchandise requiring this service."

The Board of Tax Appeals, on appeal, affirmed the order of the Tax Commissioner.

On appeal from that decision of the board, this Court, in *Lakeside Truck Rental, Inc., v. Bowers, Tax Commr.*, 173 Ohio St., 108, reversed the decision, holding that in such an instance delivery is an essential part of the making of such retail sale which does not end until such delivery is made, and that a truck used directly in making such delivery is used directly in making that retail sale, and, accordingly, remanded the cause to the board to consider the question whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the case, the purpose of the furniture company was to use the rented truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made.

Upon remand to the board, the matter was resubmitted upon the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the evidence presented at the former hearing, briefs, and the remand by this Court. The board reviewed the evidence and found that it was insufficient to support a finding that, as to any rental of a truck involved in the case, the purpose of the furniture company was to use the truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made, and again affirmed the order of the Tax Commissioner.

An appeal from that decision brings the cause to this Court for review.

Mr. Bernard S. Goldfarb, for appellant.

Mr. William B. Saxbe, attorney general, and *Mr. John B. Lindley*, for appellee.

Per Curiam. The Board of Tax Appeals could very well have opened up the case and heard additional evidence on the question, but apparently did not think it necessary to do so.

In its entry it states:

"It is obvious that trucks such as are involved herein can be used by retail furniture stores in many different ways, and that the tax status of the rental thereof depends upon *proof*, and not mere statement, that the trucks are acually used in such a way that the rental thereof is excepted from sales taxation. * * * In the instant case it is apparent that appellant, if it wished to overcome the presumption of taxability set out in R. C. Section 5739.02, should have established by competent and credible evidence that the trucks were used exclusively or primarily to deliver merchandise to homes of customers who had purchased the merchandise, and that the contracts for the sale of merchandise required the seller to make deliveries to the places indicated by the customers.

Every sale or use of tangible personal property in Ohio is presumed to be taxable, and the burden rests on the taxpayer to establish affirmatively its right to the exceptions claimed. *Standard Oil Co. v. Peck, Tax Commr.*, 163 Ohio St., 63.

It is not the function of this court to substitute its judgment for that of the Board of Tax Appeals on factual issues but only to determine from an examination of the record whether the decision reached by the board is unreasonable or unlawful.

From an examination of the record, this court is unable to find that the decision of the Board of Tax Appeals is unreasonable or unlawful. The decision is, therefore, affirmed.

Decision affirmed.

TAFT, C. J. ZIMMERMAN, MATTHIAS, GRIFFITH, HERBERT and GIBSON, JJ., concur.

ASSIGNMENTS OF ERROR.

The appellant, Lakeside Truck Rental, Inc., for its assignments of error in this cause, committed to the prejudice of this appellant, states that the Judgment of the Board of Tax Appeals in the above entitled case is erroneous and against the rights of your appellant in each of the following respects:

(1) This cause was previously decided in this Court in *Lakeside Truck Rental, Inc., Appellant, v. Bowers, Tax Commissioner, Appellee*, 173 O. S. 108, on February 14, 1962, and in that opinion in referring to the leasing of trucks by the appellant to retail furniture outlets for delivery purposes, which was the subject of the original sales tax assessment, this Court said, "in such an instance, delivery is an essential part of the making of such retail sale which does not end until such delivery is made, and a truck used directly in making such delivery is used directly in making that retail sale." Accordingly this Court, in its opinion, remanded to the Board for the consideration of the question, "whether the evidence was sufficient to support a finding that, as to any rental of a truck involved in the instant case, the purpose of the furniture company was to use the rented truck for deliveries of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made." The Board, after the Supreme Court decision, rewrote its entry on March 20, 1962 and arbitarily, oppressively, unreasonably, capriciously and in a glaring abuse of discretion, regarded the following *uncontradicted evidence* of the president of the appellant, F. J. O'Neill, Jr., as "opinion" and "mere statement of the witness":

"(7) Q. Now, Mr. O'Neill, referring to the type of business that you do, would you explain your opera-

tions to this Board with respect to Kurtz Furniture Company and Bing Company?

"A. Both of the companies mentioned are in the retail furniture business, with a number of stores throughout the City and throughout the State in the case of Bing's. They sell in most cases, I would imagine, large bulky-type items of furniture and our furnishing them the vehicle—we furnish them with all the component parts except the labor and they use this vehicle to consummate the sale that they have made in their stores."

* * * * *

"(22) Re-Direct Examination of F. J. O'Neill, Jr.

By Mr. Resnick:

"Q. These trucks that you furnish then to the Bing Company and Kurtz, they are used then to complete the sale made by these companies?

"A. Yes, sir.

"Mr. Kirwin: By that you mean that they are used to haul the merchandise from the Bing Company store to where the consumer wants it delivered?

"The Witness: That is correct, sir."

(2) The entry of March 20, 1962 failed to follow the law of the case.

(3) The entry of March 20, 1962 is contrary to the evidence and is unsupported thereby.

(4) The entry and conclusion of the Board of Tax Appeals of March 20, 1962 is contrary to the evidence as established in the record.

(5) The Board of Tax Appeals in its entry of March 20, 1962 failed to give notice to your appellant of a date, time and place of hearing as required by law, and therefore the entry of March 20, 1962 is void.

(6) The Board of Tax Appeals in its entry of March 20, 1962 failed to follow the facts as established in the record in the proceeding in this cause.

(7) The Board of Tax Appeals in its entry of March 20, 1962 does not support its entry with any evidence substantially or otherwise, and its findings and determination are based on whim and caprice.

(8) The Board of Tax Appeals is without authority to review its original order after it has become final and from which an appeal was taken to the Supreme Court by a reconsideration only of the evidence on which the original order was made and without any new evidence.

(9) The Board of Tax Appeals has failed to comply with the order and decision of the Supreme Court of Ohio.

(10) The conclusion of the Board of Tax Appeals is contrary to the evidence and the law.

(11) The entry of March 20, 1962 of the Board of Tax Appeals is unlawful and unreasonable and should be reversed and abated, including penalties, and the appellant should be discharged therefrom with its costs.

WHEREFORE, appellant prays that the order and judgment of the Board of Tax Appeals in said proceedings and that the judgment and order and assessment of deficiency of the Tax Commissioner may be reversed and vacated and judgment in this case entered in favor of the appellant herein, and for all further and proper relief.

ORDER DENYING REHEARING.

(Entered May 8, 1963.)

It is ordered by the Court that rehearing in this case is denied.